

# Montana

## WATER RIGHTS FACT SHEET

August 15, 2001

### **Water Rights System:**

Water rights in Montana are guided by the prior appropriation doctrine. Montana law establishes that the state's water resources are the property of the State of Montana and are to be used for the benefit of the people. Montana has closed some of its river basins to certain types of new water appropriations due to water availability problems, over appropriation, and a concern for protecting existing water rights. Montana water law authorizes the closure of basins to certain new appropriations through the adoption of administrative rules and the negotiation of reserved water right compacts.

Montana water law is contained in the Montana Water Use Act (Title 85, Chapter 2, MCA) of 1973. The act (effective July 1, 1973) changed the water rights administration significantly in the following ways.

- \* All water rights existing prior to July 1, 1973, are to be finalized through a statewide adjudication process in state courts.
- \* A permit system was established for obtaining water rights for new or additional water developments.
- \* An authorization system was established for changing water rights.
- \* A centralized records system was established (prior to 1973, water rights were recorded, but not consistently, in county courthouses throughout the state).
- \* A system was provided to reserve water for future consumptive uses and to maintain minimum instream flows for water quality, fish, and wildlife.

### *Responsible Agency:*

Authority for water rights decisions is shared by the district court (including the water court) and the Water Resources Division of the Montana Department of Natural Resources and Conservation (DNRC). The Montana Water Court, a division of the district court, is in charge of general stream adjudications for all pre July 1, 1973 water rights. The Water Resources Division within the DNRC is responsible for the administration, control, and regulation of water appropriated after June 30, 1973.

### **Application Process:**

New appropriation of water or a new diversion, withdrawal, impoundment, or distribution requires the filing of an Application for Beneficial Water Use Permit. This form requests information describing the intended use, place of use, point of diversion, source of supply, amount of water to be used, diversion facilities, and other particulars of the proposed appropriation. An Application for Beneficial Water Use Permit is also required before appropriating groundwater of more than 35 gallons per minute and 10 acre-feet per year. **Permits are not required, however, for groundwater uses of less than thirty-five gallons per minute, but a Notice of Completion must be filed in order to acquire the water right.**

Upon receipt of an application, the regional office reviews and investigates the application. Upon completion of the review, the DNRC publishes a notice in a newspaper and contacts any potentially affected water users. Objections to the application can then be made, and if they cannot be resolved, a hearing examiner considers the case through an administrative hearing. An environmental review is also made to determine whether the proposed project will have significant environmental impacts and whether an environmental impact statement is needed.

The following criteria are considered when a new appropriation of water is requested in Montana:

- \* Is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate?
- \* Can water reasonably be considered legally available during the period in which the applicant seeks to appropriate and in the amount requested?
- \* Will the water rights of a prior appropriator under an existing water right, a certificate, a permit, or state water reservation be adversely affected?
- \* Are the proposed means of diversion, construction, and operation of the appropriation works adequate?
- \* Is the proposed use of water a beneficial use?
- \* Does the applicant have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use?

If a valid objection pertaining to water quality is received, an applicant must also prove that:

- \* The water quality of a prior appropriator will not be adversely affected,
- \* The proposed use will be in accordance with the established classification of water for the source of supply pursuant to 75-5-301(I), MCA, or
- \* The proposed use will not adversely affect the ability of a discharge permit holder to satisfy effluent limitations in accordance with Title 75, Chapter 5, Part 4.

If the application is approved by the DNRC, the applicant receives a permit. Once a permit is received, the permittee then must construct the project, divert the water, and put the water to the intended use as outlined in the permit. When this is finished, the permittee must provide the DNRC with a certified statement describing how the appropriation has been completed. This includes submitting a Project Completion Notice for Permitted Water Development to the DNRC before the deadline specified in the permit or any authorized extension of time. After the project is completed, the DNRC will review the project completion notice and determine whether the project was completed in accordance with the permit. The DNRC will then issue a Certificate of Water Right as long as the project has been completed, the water has been used according to the terms of the permit, and the basin in which the permit lies has been adjudicated and the final decree issued. The priority date of a certificate becomes the date of the original permit. The types of applications that can be filed in Montana can be seen in Appendix One.

The estimated processing time for an application that is correct and complete is 210 days.

#### *Point of Diversion and Change of Use Procedures:*

A holder of a water right, permit, certificate, or water reservation may change the point of diversion, place of use, purpose of use, and place of storage by obtaining prior approval from the DNRC. In order to do this, a person must submit an Application for Change of Appropriation Water Right to DNRC and include information on the water right to be changed and the proposed change. An application for change follows the same general process for notice and hearing as outlined above. Upon completion of the change, the appropriator must file a Project Completion Notice for Change of a Water Right notifying the DNRC that the authorized change is completed.

*State Recognized Beneficial Uses:*

Beneficial use in Montana means "a use of water for the benefit of the appropriator, other persons, or the public". Recognized uses have previously included, but are not limited to:

Agriculture	Municipal
Commercial	Navigation
Domestic	Power
De-watering	Pollution Abatement
Erosion Control	Recreation Uses
Fire Protection	Sediment Control
Fish	Storage
Fish Raceways	Stock water
Geothermal	Waterfowl
Industrial	Water Leased
Irrigation	Wildlife
Mining	

**Groundwater:**

Groundwater use regulations are different within controlled groundwater areas than outside of these designated areas. Controlled Groundwater Areas may be proposed by the DNRC on its own motion, by petition of a state or local public health agency, or through a petition signed by at least 20 or one-fourth (whichever is less) of groundwater users where the petitioners feel a controlled groundwater area is necessary. One or more of the following criteria must be met in order for the DNRC to declare an area a Controlled Groundwater Area:

- \* Groundwater withdrawals are in excess of recharge to the aquifer.
- \* Excessive groundwater withdrawals are very likely to occur in the near future because withdrawals have consistently increased in the area.
- \* There are significant disputes within the area concerning priority of rights, amounts of water being used, or priority of type of use.
- \* Groundwater levels or pressures are declining or have declined excessively.
- \* Excessive groundwater withdrawals would cause contaminant migration.
- \* Groundwater withdrawals adversely affecting groundwater quality are occurring or are likely to occur.
- \* Water quality within the groundwater area is not suited for a specific beneficial use.

When the DNRC is considering the designation of a Controlled Groundwater Area, it will notify concerned parties and hold public hearings to gather comments and information. After notice and public hearing, the DNRC will issue an order. If the order declares a permanent or temporary Controlled Groundwater Area, the order will contain the specific control provisions. See Appendix One for more information on Montana's Controlled Groundwater Areas.

Nine Controlled Groundwater Areas have been designated in Montana:

- \* The South Pine Controlled Groundwater Area
- \* The Larson Creek Controlled Groundwater Area
- \* The Hayes Creek Controlled Groundwater Area
- \* The Warm Springs Ponds Controlled Groundwater Area
- \* The Rocker Controlled Groundwater Area
- \* The Bozeman Solvent Site Controlled Groundwater Area
- \* The Old Butte Landfill/Clark Tailings Controlled Groundwater Area
- \* The Idaho Pole Company Site Controlled Groundwater Area
- \* The North Hills Controlled Groundwater Area

Outside of Controlled Groundwater Areas, a permit to appropriate water is required before any development can begin, and obtaining this permit involves the application process described above. A person does not, however, need to apply for a permit to develop a well or a groundwater spring with an anticipated use of 35 gallons per minute or less, not to exceed 10 acre-feet per year. In this instance, the first step is to drill the well or develop the spring. A Well Log Report is completed by the driller and sent to the DNRC within 60 days. After the development is put to use, the owner submits a Notice of Completion of Groundwater Development to the DNRC. The priority date of the water right is the date the DNRC receives the Notice of Completion. A person must have exclusive property rights in the groundwater development works or written consent from the person with the property rights. A Certificate of Water Right will then be issued to the owner for the specified use.

### **Water Rights:**

A water right in Montana can be held by an individual, group of individuals, organization, corporation, government agency, etc. In Montana, water rights are attached to the piece of land on which they are used. If a piece of land is transferred, any water right attached to that land passes along with it unless specifically stated otherwise. A water right may be severed from the land and sold or retained independently from the land. If the land is sold but the water right is retained, the DNRC does not need to be notified. If, however, the water right alone is transferred to a new owner, an ownership update must be filed with the department. In either case, for the water right to be used again elsewhere, the owner must file an Application To Change A Water Right to change the water right's place of use.

A water right under a permit can be abandoned if it is not used and there is an intent to abandon. If an appropriator ceases to use all or part of an appropriation with the intention to abandon, the right is considered abandoned. In addition, a right is considered to be abandoned if it is not used for ten consecutive years (even if there is not evidence of intent to abandon).

### **Adjudications:**

In 1979, the Montana Legislature passed a bill amending the adjudication procedures originally established by the Montana Water Use Act. Rather than adjudicating existing water rights one basin at a time, the legislature opted for a comprehensive general adjudication of the entire state's 85 drainage basins. Existing water rights are those that originated before July 1, 1973.

Montana is divided into four water divisions, and the Water Court presides over each division for the purpose of adjudicating existing water rights. The Reserved Water Rights Compact Commission (RWRCC) was created to negotiate compacts with federal agencies and Indian tribes to quantify their reserved water rights in Montana. These negotiated compacts are incorporated into Montana's adjudications.

The Montana Supreme Court has issued an order requiring every person claiming ownership of an existing water right to have filed a statement of claim for that right with the DNRC by January 1, 1982. Stockwater and domestic claims for ground water or instream flow, however, were exempted from this process, though such claims could be filed voluntarily. Existing water rights that were not filed by the deadline are considered to have been abandoned.

The DNRC's role in the adjudication process is to provide technical assistance to the Water Court. Prior to the issuance of a decree, the DNRC examines each claim for completeness, accuracy, and reasonableness. After all claims in a basin are examined, the DNRC issues a summary report to the Water Court, which is available to the public. The court uses this report in preparing the decree for the basin.

Notice of issuance of every temporary preliminary or preliminary decree is given to all parties who may be affected by the decree, along with notice of the time period for objecting to the rights or

compacts, or both, in the decree. Water users are encouraged to review the decree and file objections if they feel their claims, or claims belonging to others in the basin, are in error or contain incorrect information. Following the expiration of a decree's objection period, each party whose claim received an objection must be given notice of the filing of that objection. This notice triggers a 60-day counter objection period. A water judge or water master hears all objections and counter objections. After all objections are resolved, the water judge issues a final decree. On the basis of the final decree, the DNRC will issue a Certificate of Water Right to each person decreed an existing water right.

Existing water right claims for livestock and domestic uses from instream flows or ground water sources are exempt from the adjudication process. If claims are not filed, exempt rights are placed in the DNRC's central records for notice purposes. The owner must submit a completed Notice of Water Right. The filing of this notice does not constitute recognition of a water right. The burden of proof of these water rights remains with the owners. Once the water right is entered into the records, the owner will receive notice of any actions on the source of supply that may affect the water right.

Number of Ongoing Adjudications:

The status of adjudications on Montana's basins can be found at:  
<http://www.dnrc.state.mt.us/wrd/WaterRights/adjStat.htm>

### **Instream Flows:**

Montana's instream flow program began in 1969 when the state enacted legislation allowing the Department of Fish, Wildlife, and Parks the right to appropriate water on twelve trout streams. In 1973, the state replaced this legislation with a reservation system which allowed state and federal agencies to request a reservation for minimum flows on any stream. In 1989, further legislation was enacted which allowed the Department of Fish, Wildlife, and Parks to lease water rights for instream flows (but on a limited number of stream reaches). The legislation has been modified several times, changing the number of stream reaches upon which leases could be held. In 1995, the water leasing program was expanded to allow individuals and private groups to lease water rights for instream use.

Today, instream flow rights in Montana can be established through new appropriations or through water transfers. New appropriations for instream flow can be established through the water reservations system. Under the reservation statute, the state, any sub-division of the state (including municipalities, conservation districts, and any other state agency), or a federal agency may apply to the DNRC for instream flow use. These applications for minimum flow reservation go through the same application process described above, but the DNRC reviews the right every ten years and may extend, condition, or revoke the reservation. Priority dates for the reservations, as with other applications, are determined by the application date.

Instream flows can also be maintained in Montana through water transfers. There are three ways to convert an existing consumptive use water right to instream use. A person may lease all or a portion of a water right to the Montana Department of Fish, Wildlife & Parks (FWP), lease the water right to another party interested in holding the right for the fishery, or convert the water right to an instream use. Any conversion to an instream use requires a temporary change authorization from the DNRC and must benefit fisheries.

### ***Recognized Beneficial Uses for Instream Flow:***

Beneficial uses for instream flows are vaguely defined in Montana. State law indicates that a beneficial use can be any use that benefits the appropriator, other persons, or the public. This leaves the decision of what constitutes a beneficial instream flow use to the discretion of the

DNRC. Most instream flow uses to date have been to benefit fisheries and to maintain water quality, but instream flow uses are not necessarily limited to these uses.

#### *Holdership of Instream Flow Water Rights:*

Federal agencies and any political subdivision of the state may apply for and hold instream flow reservations (from new appropriations). With some restrictions, private or public entities may lease water rights for instream flow. "Any person" may also lease a water right for instream flow. Montana statute defines "person" as "an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity". The Montana Department of Fish, Wildlife, and Parks is authorized to lease rights for instream flow, but only on a certain number of stream reaches (the FWP is currently authorized to hold leases on 40 reaches).

#### **Federal Reserved Water Rights:**

A Reserved Water Rights Compact Commission has been established in Montana to negotiate compacts with federal agencies and Native American tribes in an effort to quantify federal reserved rights. Negotiated compacts will be incorporated into the statewide general stream adjudications. When negotiations fail to produce compacts, federal reserved water rights will then be determined through the state adjudication process.

To date, the RWRCC has negotiated and the Montana Legislature has ratified these compacts:

- \* Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation-State of Montana
- \* Northern Cheyenne Tribe-State of Montana
- \* United States National Park Service-State of Montana (Big Hole National Battlefield, Glacier National Park, Yellowstone National Park, Bighorn Canyon National Recreation Area, and Little Bighorn Battlefield National Monument)
- \* Chippewa Cree Tribe of the Rocky Boy's Reservation-State of Montana
- \* United States Bureau of Land Management-State of Montana (2 Units - Bear Trap Canyon Public Recreation Site and Upper Missouri National Wild and Scenic River)
- \* United States Fish and Wildlife Service-State of Montana (2 Units - Benton Lake National Wildlife Refuge and Black Coulee National Wildlife Refuge)
- \* Crow Tribe-State of Montana

#### **BLM Specific Information:**

There are several aspects of the application process that are particularly relevant to the BLM's work in Montana. The capability to proceed with the construction of small stockwater ponds without first applying for a permit has greatly facilitated the BLM's ability to meet the need for flexibility within the range improvement program. The twenty-one month average processing time for a regular water permit can sometimes frustrate projects. In cases where objections are received to BLM permit applications, it is becoming more difficult for the BLM to provide the expert testimony required to support the application because the BLM in Montana has fewer hydrologists and soil scientists and engineers available to provide such testimony. Additionally, many of the BLM specialists do not have sufficient training in appearing as an expert witness to allow them to adequately prepare for this role.

The following information applies to BLM right-of-way approvals & filing fees. The water right application form requires a signature by the landowner if different from the applicant. This signature is accepted by the state as proof that the necessary permissions have been secured. There has never been any request for proof of final right-of-way approval. The BLM pays the same filing fees for new appropriations (post-1973) as all other applicants. In the statewide general adjudication legislation, the legislature set the filing fees at \$40.00 per claim up to a maximum of \$400.00 per claimant per water division. The BLM also paid these fees at the

maximum per division. New appropriation fees generally amount to less than \$2000.00 per year in recent years. This is mostly due to the decrease in the number of applications due to basin closures, increased difficulty in securing new permits, and decrease in project dollars for range improvements.

The BLM is very active in Montana's general statewide adjudications. Montana is adjudicating all water rights that existed prior to July 1, 1973, and the BLM has filed more than 22,000 claims. The BLM state office in Montana routinely defends these claims, as well as objects to other claims which adversely impacts the BLM's water uses and programs.

The BLM has been active in protecting natural flows in Montana. Besides the state's instream flow program (discussed above), BLM has used several other methods to protect natural flows. Protection of instream flows was a critical issue in the compact negotiations for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Recreation Site. Montana also has initiated several state-based reservation proceedings to allow users to reserve instream flows. The BLM has secured these instream flow reservations on 31 stream reaches in the Upper Missouri River Basin to protect riparian habitat and flows for threatened and endangered species (west slope cutthroat and/or Arctic grayling). The BLM has also held discussions with the Bureau of Reclamation concerning their ability to augment instream flows from storage facilities in Montana.

Negotiations over the BLM's federal reserved water rights are progressing in Montana. The BLM has reached a compact with the State of Montana for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Recreation Site. The State has declined to attempt a compact for the various PWR107 water sources, but will handle them through the adjudication process. The BLM is currently working through BLM and USDI approvals to begin negotiations for the Upper Missouri River Breaks National Monument reserved water rights.

The BLM and the State of Montana have enjoyed a good and cooperative working relationship regarding water rights. The BLM is an active participants on many water related joint working groups to deal with water rights and water quality issues in Montana. Montana is in the early stages of a new state administration resulting from the last election and BLM has yet to see whether that will change this relationship (although no problems are expected).

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<http://www.dnrc.state.mt.us/wrd/home.htm>

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## **Appendix One: Types of Applications**

Montana Water Right Forms include:

- \* Application for Beneficial Water Use Permit
- \* Notice of Completion of Groundwater Development
- \* Well Log Report
- \* Application for Provisional Permit for Completed Stockwater Pit or Reservoir
- \* Application for Change of Appropriation Water Right
- \* Application for Extension of Time
- \* DNRC Water Right Ownership Update
- \* Water Right Dispute Options
- \* Objection to Application
- \* Notice of Completion of Permitted Water Development
- \* Notice of Completion of Change of Appropriation Water Right